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FUN FATT v. KERAJAAN MALAYSIA & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
MARIANA YAHYA J
[JUDICIAL REVIEW NO: WA-25-95-02-2019]
20 MARCH 2020

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LAND LAW: *Acquisition – Withdrawal – Withdrawal from acquisition of land – Whether second respondent had taken possession of land with permission of relevant authority under s. 18(a) of Land Acquisition Act 1960 ('LAA 1960') – Whether permanent modifications made to land – Whether usage of land changed from residential to transportation – Refusal to pay compensation sum – Whether respondents acted reasonably, fairly and rationally – Whether respondents' purported act of withdrawal ultra vires and an abuse of process – Whether respondents breached art. 13 of Federal Constitution – Whether withdrawal contravened s. 35(1) of LAA 1960*

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ADMINISTRATIVE LAW: *Judicial review – Application for – Application for certiorari order to set aside first respondent's decision to withdraw from acquisition of land – Whether second respondent had taken possession of land with permission of relevant authority under s. 18(a) of Land Acquisition Act 1960 ('LAA 1960') – Whether permanent modifications made to land – Whether usage of land changed from residential to transportation – Refusal to pay compensation sum – Whether respondents acted reasonably, fairly and rationally – Whether respondents' purported act of withdrawal ultra vires and an abuse of process – Whether respondents breached art. 13 of Federal Constitution – Whether withdrawal contravened s. 35(1) of LAA 1960 – Whether withdrawal ought to be quashed*

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The deceased was the owner of a piece of land ('land'). The applicant was appointed as the administrator of the deceased's estate and it was declared that the title to the land be vested in the applicant's name. On 27 April 2017, a declaration in Form D pursuant to s. 8 of the Land Acquisition Act 1960 ('the Act') was published in the *Government Gazette* declaring that the whole land was needed for the purposes of the Setiawangsa-Pantai Expressway Sdn Bhd Project ('SPE Project'). The construction and completion of the SPE Project was undertaken by a company, Lebuhraya Duke Fasa 3 Sdn Bhd ('DF3'). Hence, the acquisition of the land by the first respondent and the subsequent possession of the land by the second respondent were for the benefit of DF3, as the concessionaire appointed by the respondents. The second respondent awarded the sum of RM10,171,885.50 ('the compensation sum') for the acquisition of the whole land. Subsequently, a notice of award and offer of compensation in Form H pursuant to s. 16 of the Act was issued and served to the applicant. As at 9 October 2017, DF3 and Kuala Lumpur City Hall ('DBKL') occupied the land with permission from the second

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respondent. Later, on 28 November 2017, the applicant sought the payment of the compensation sum from the second respondent and requested for formal possession in Form K pursuant to s. 22 of the Act to be issued since the possession of the land had been taken but the compensation sum was yet to be paid to the applicant. Due to the second respondent's failure to pay the compensation sum, the applicant commenced an action at the High Court ('Suit 436') against the respondents, DF3, Lembaga Lebuhraya Malaysia ('LLM') and DBKL primarily seeking that the compensation sum be paid forthwith. Suit 436 was still pending. In the course of the proceedings, it was discovered that steps were taken to honour the payment of the compensation sum. However, the compensation sum was not made arising from DF3's intention to withdraw from the acquisition. Despite the DF3's intention to withdraw from the acquisition, DF3 assured that there would be no design change to the highway under the SPE Project. Nonetheless, the first respondent then published its decision to withdraw from the acquisition in the *Government Gazette* pursuant to s. 35 of the Act ('withdrawal'). Aggrieved by the said withdrawal, the applicant filed this judicial review application seeking for, *inter alia*, an order for *certiorari* to quash and/or set aside the decision of the first respondent to withdraw from the acquisition. The issue that arose was whether the withdrawal by the first respondent from the acquisition of the said land under s. 35(1) of the Act was illegal, *ultra vires* and an abuse of process. The respondents, in opposing the judicial review application, submitted that under s. 35(1) of the Act, they were at liberty to withdraw from the acquisition of the said land of which possession had not taken place.

Held (allowing application):

(1) By a plain reading of s. 18(a) of the Act, the second respondent had taken possession of the said land upon service of Form H. The second respondent had admitted to issuing Form H to the applicant and had also forwarded, Form H to KKR, requesting for the compensation sum to be paid. DF3 also admitted to entering the said land with the permission of the relevant authority. It was thus an undisputed fact that possession of the land had been taken by DF3 and DBKL, by permission of the second respondent, and work had commenced and was continuing and this could be seen from the colour photographs of the works being carried out on the land. DF3's letter to LLM dated 10 November 2017 confirming that there would be no change in the design of the highway clearly showed DF3's intention to remain on the land and continue with the construction and completion of the highway despite the alleged withdrawal of the acquisition. If DF3 was not allowed into possession of the said land by the second respondent, there was absolutely no need

A for DF3 to give such an indemnity to the second respondent. It was thus evident that the respondents had taken possession of the said land under s. 18(a) of the Act and it could not be withdrawn as it contravened s. 35(1) of the Act. (paras 17-21)

(2) There were no good grounds put forth as to why the request for the B withdrawal was approved and consequently gazetted when, in fact, there was a highway constructed on the said land which could not be removed. The highway was surely in furtherance of a public purpose. The applicant had been dispossessed of the said land. The applicant's land had been taken and yet the second respondent refused and/or failed to C pay the compensation awarded. The second respondent having taken possession of the land and allowing DF3 to construct a highway on it and now allowed DF3's request to withdraw from the acquisition was beyond imagination that could be said that the respondents had acted reasonably, fairly and rationally. In fact, the respondents' purported act D of withdrawing was contrary to s. 35(1) of the Act and it was *ultra vires*. (paras 27 & 28)

(3) In accordance with the SPE Project, the land previously zoned for residential use under the Draft Kuala Lumpur 2020 City Plan had been changed to transportation. Being zoned for transportation use, the estate E of the deceased had limited use or no use at all for the land. Permanent modifications had been made to the said land and permanent structures such as concrete pillars supporting an elevated highway and a bottom road highway had been erected and constructed on the land. All in all, the withdrawal was unreasonable and an abuse of process as the usage F of the said land had been changed from residential to transportation and two highways were running through the land currently. The withdrawal at this juncture was illogical and irrational. (para 31)

(4) Despite the intention to continue occupying the land, the second respondent nonetheless refused to pay the compensation sum and G purported to withdraw from the acquisition. The second respondent had acted irrationally and so unreasonably by commencing land acquisition proceedings, making the award, taking possession of the land and then refusing to pay compensation sum. The respondents were thus liable for breaching art. 13 of the Federal Constitution and the Act. The H respondents had failed to observe the basic rules of natural justice, to act with procedural fairness toward the applicant who would be affected by the decision and to observe procedural rules that were expressly laid down in statute. (paras 32 & 34)

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(5) The respondents' stance that the Form K was the only means to take possession was misconceived. A reading of the Act will show that Parliament had only intended for Form K to be utilised to take possession of the land that contained building(s), otherwise, possession could be taken upon service of the Form H or I. Possession did not mean only formal possession. Section 35 of the Act is clear on this. Therefore, once possession had been taken in any of the instances as specified in the Act, withdrawal from acquisition is prohibited. The State Authority misunderstood the meaning and effect of ss. 18 and 35 of the Act in coming to a decision to withdraw from the acquisition, whereby rendering its decision illegal. The withdrawal thus must be quashed. (paras 35 & 36)

Case(s) referred to:

Associated Provincial Picture Houses v. Wednesbury Corp [1948] 1 KB 223 ***(refd)***

Dato' Fong Chow & Ors v. Pentadbir Tanah Daerah Jerantut & Anor [1988] 1 LNS 94 HC ***(refd)***

Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159 SC ***(refd)***

Hong Lee Trading & Construction Sdn Bhd v. Taut Ying Realty Sdn Bhd [1991] 1 CLJ 121; [1991] 2 CLJ (Rep) 722 HC ***(refd)***

Ishmael Lim Abdullah v. Pesuruhjaya Tanah Persekutuan & Anor [2014] 7 CLJ 882 CA ***(refd)***

Malaysia Airlines System Bhd v. Wan Sa'adi Wan Mustafa [2015] 1 CLJ 295 FC ***(refd)***

Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***

Legislation referred to:

Federal Constitution, art. 13

Government Proceedings Act 1956, s. 33(3)

Land Acquisition Act 1960, ss. 8, 10, 14, 16, 18(a), 22(1), 35(1), (2)

For the applicant - Raj Shankar & Tina Ann Francis; M/s Mathews Hun Lachimanan
For the respondents - Shahmin Amizah Abu Bakar; SFC

Reported by Suhainah Wahiduddin

JUDGMENT

Mariana Yahya J:

Introduction

[1] This is the applicant's application for judicial review which seeks *inter alia* for the followings:

(i) An order for *certiorari* to quash and/or set aside the decision of the first respondent to withdraw from the acquisition *vide* Federal Government Gazette Notification No. 696 dated 4 January 2019 publishing a notice of withdrawal from acquisition dated 27 December 2018 pursuant to

A s. 35 of the Land Acquisition Act 1960 in respect of land held under Mukim 104, Lot 1009, Mukim Ampang, Daerah Kuala Lumpur Wilayah Persekutuan (the land) scheduled to be acquired as published in the Federal Government Gazette Notification No. 8008 dated 27 March 2017 (the withdrawal).

B (ii) A declaration that the withdrawal is *ultra vires* and/or illegal and/or irrational and/or unreasonable and/or procedurally improper and/or an abuse of process.

(iii) An order of *mandamus* directed at the second respondent to complete the acquisition of the land by taking the following steps below:

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(a) Issuing and serving Form K in accordance with s. 22 of the Land Acquisition Act 1960 in respect of the land;

(b) Making a memorial on the register document of title of the land stating that the said land has been acquired and vested in the first

D respondent.

(iv) A consequential order that a certificate be issued by the court against the second respondent pursuant to s. 33(3) of the Government Proceedings Act 1956 for the payment of compensation in the sum of RM10,171,885.50 as stated in Form H dated 9 October 2017 together with RM579,658.12

E as late payment charges calculated at the rate of 5% per annum from 9 January 2018 to date and continuing.

(v) Costs.

(vi) Such further and other relief deemed necessary and suitable by the court.

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Background Facts

[2] Lo Pang @ Fun Lim (the deceased) is the owner of the land. *Vide* an order of the High Court of Kuala Lumpur dated 28 July 2017, the applicant was appointed as the administrator of the deceased's estate and it was

G declared that the title to the land be vested in the applicant's name.

[3] On 27 April 2017, a declaration in Form D pursuant to s. 8 of the Land Acquisition Act 1960 (the Act) was published in the *Government Gazette* declaring that the whole land was needed for the purposes of the Setiawangsa-Pantai Expressway Sdn Bhd Project (SPE project). The construction and

H completion of the SPE Project is undertaken by a company known as Lebuhraya Duke Fasa 3 Sdn Bhd (DF3). Hence, the acquisition of the land by the first respondent and the subsequent possession of the land by the second respondent is done for the benefit of DF3, as the concessioner appointed by the respondents.

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[4] On 7 August 2017, a notice of inquiry in Form E was issued by the second respondent pursuant to s. 10 of the Act informing that the land inquiry shall take place on 7 September 2017. The applicant attended the inquiry on 7 September 2017 but it was postponed to 26 September 2017 as the second respondent advised the applicant to submit a valuation report on the acquisition exercise.

[5] The applicant then appointed Messrs. Azmi & Co (the valuer) to carry out a valuation on the land to determine an appropriate compensation sum payable on the acquisition exercise. The valuer then produced its report estimating that the appropriate compensation payable is RM23,228,684 (the valuation report).

[6] Upon conclusion of the second inquiry on 26 September 2017, the second respondent awarded the sum of RM10,171,885.50 (the compensation sum) for the acquisition of the whole land. The award made by the second respondent was recorded in Form G pursuant to s. 14 of the Act. Despite the valuer's estimation that the appropriate compensation was approximately RM23 million, nonetheless, the applicant decided to accept the compensation sum and did not wish to commence land reference proceedings to raise objections on the award.

[7] Subsequently, on 9 October 2017, a notice of award and offer of compensation in Form H pursuant to s. 16 of the Act was issued and served to the applicant. As at 9 October 2017, DF3 and Kuala Lumpur City Hall (DBKL) occupied the land with permission from the second respondent.

[8] Later, on 28 November 2017, the applicant instructed his previous solicitor to seek the payment of the compensation sum from the second respondent and requested for formal possession in Form K pursuant to s. 22 of the Act to be issued since the possession of the land had been taken but the compensation sum is yet to be paid to the applicant. Nevertheless, there was no reply from the second respondent.

[9] Due to the second respondent's failure to pay the compensation sum, the applicant had commenced an action *vide* Kuala Lumpur High Court Originating Summons No. WA-24NCvC-436-03-2018 (Suit 436) against the above-named respondents, DF3, Lembaga Lebuhraya Malaysia (LLM) and DBKL primarily seeking that the compensation sum be paid forthwith. Suit 436 is still pending. In the course of the proceedings, it was discovered that steps were taken to honour the payment of the compensation sum. However, the compensation sum was not made arising from DF3's intention to withdraw from the acquisition. Despite the DF3's intention to withdraw from the acquisition, DF3 assured that there will be no design change to the

highway under the SPE Project. Nonetheless, the first respondent then published its decision to withdraw from the acquisition in the Government Gazette No. 696 dated 27 December 2018 pursuant to s. 35 of the Act (the withdrawal).

[10] Aggrieved by the said withdrawal, hence the applicant filed this judicial review application amongst others on the following grounds:

(i) The deceased's estate has been deprived of the use and enjoyment of the land and/or any benefits arising from or borne from the land.

(ii) In accordance with the SPE Project, the land previously zoned for residential use under the Draft Kuala Lumpur 2020 City Plan has been changed to transportation. Being zoned for transportation use, the deceased's estate has limited use or no use at all for the land.

(iii) Permanent modifications have been made to the land and permanent structures such as concrete pillars supporting an elevated highway and a bottom road highway have been erected and constructed on the land.

(iv) Based on the assurance by DF3 that there will be no design change to the highway under SPE Project indicates that DF3 intends to continue occupying the land without paying the compensation sum.

(v) The publication of the withdrawal after possession of the land has been lawfully taken is not in accordance with the Act. Section 35 of the Act clearly states that the withdrawal from the acquisition can only take place over lands where possession has not been taken. Meanwhile, s. 18 of the Act allows possession to be taken by the Land Administrator of any land in respect of which an award has been made in Form G and such possession being taken at the time of the service upon the occupier of such land a notice in Form H, or at any time thereafter.

(vi) In this present case, the possession of the land was taken upon the issuance and service of Form H on 9 October 2017. Further, the occupation of DF3 and DBKL on the land is obvious by the construction of a bottom road highway, concrete pillars and an elevated highway. In addition, the applicant believes that DF3 intends to continue occupying the land as DF3 has admitted that there would be no design change in the intended highway.

(vii) Once possession of the land is taken, the State Authority has no power to withdraw from the acquisition. As the registered proprietor of the land, the applicant should not be denied adequate compensation for the acquisition of the land.

[11] The respondents however opposed to this judicial review application amongst others on the following grounds:

(i) It is expressly stated under s. 35(1) of the Act that the State Authority is conferred with the power to make withdrawal ie, do not proceed with the land acquisition. Such withdrawal can only be made before Form K been served pursuant to s. 22(1) of the Act and should be gazetted in the *Government's Gazette*.

(ii) The respondents never disputed the facts that *vide* the letter from LLM dated 29 December 2017, DF3 has applied for withdrawal of land acquisition under s. 35 of the Act together with an undertaking letter from DF3 dated 11 December 2017 to indemnify any losses incurred.

(iii) *Vide* a letter dated 6 February 2018, Kementerian Kerja Raya (KKR) forwarded the DF3's application as well as the LLM's letter dated 26 January 2018 to Pengarah Jabatan, Ketua Pengarah Tanah dan Galian (Persekutuan). Subsequently, on 22 June 2018, the said application has been submitted for Jawatankuasa Kerja Tanah Wilayah Persekutuan Kuala Lumpur's (JKTWPKL) consideration and decision.

(iv) On 21 November 2018, the JKTWPKL's meeting Bil. 725/2018 was convened and the said application has been approved. As such, a *Gazette* dated 14 January 2019 pertaining to the said withdrawal has been issued.

(v) The respondents submitted that the withdrawal application was made in compliance with the provision laid down under s. 35 of the Act. Hence, the said withdrawal application is a valid application since DF3 has made such application prior to the issuance of Form K ie, before the transfer of possession was done. Further, a formal possession of land is made under s. 22 of the Act by way of issuing Form K to the applicant.

(vi) Based on the provision under s. 22(1) of the Act, the withdrawal can only be made before Form K being issued and registered under DF3's possession pursuant to s. 35(1) of the Act.

(vii) It is not disputed that the second respondent never issued or served Form K to the applicant prior to the withdrawal application been made by DF3 whereby it is submitted that such application is valid and in accordance with the Act.

A (viii) Further, based on Pekeliling Ketua Pengarah Tanah dan Galian Persekutuan Bilangan 27/2009 berkenaan Mengambil Milik (Taking Possession) Seksyen 18 dan Mengambil Milik Secara Rasmi (Taking Formal Possession) Seksyen 22, it is indirectly indicates that as long as there is no formal acquisition/possession, a withdrawal from such
B acquisition/possession still can be made under s. 35(1) of the Act.

(ix) In this present case, *vide* LLM's letter dated 29 December 2017, LLM had informed the second respondent pertaining to the DF3's application to withdraw from the acquisition. Therefore, the DF3's application was made before the formal possession of the applicant's
C land was complete. Hence, the issue as to the issuance and service of Form K to the applicant is no longer arise since DF3 is no longer has the intention to acquire the said land.

(x) With reference to the *Gazette* dated 14 January 2019 which allowing the withdrawal application, it is submitted that the applicant's
D application for a *mandamus* order directing the second respondent to issue and serve Form K should be dismissed by the court since the withdrawal application was made prior to the issuance of Form K to the applicant. Therefore, there is no formal possession took place and the applicant is still the legal and valid owner of the land until today.

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(xi) Hence, the respondents have acted reasonably, appropriately and fairly in implementing the withdrawal application and it is not *ultra vires* as well as in compliance with the provision provided under s. 35(1) of the Act. Therefore, the respondents have acted in accordance with the law and have not at any time acted in excess or
F without jurisdiction.

(xii) Pursuant to the said withdrawal application, the notice in Form H dated 9 October 2017 pertaining to the compensation issued to the applicant is no longer valid or enforceable. The issuance of Form H did not indicate that the land has been formally acquired/possess. In
G fact, the formal acquisition/possession is after Form K has been issued and served to the applicant.

(xiii) Further, pursuant to the said withdrawal, the second respondent must determine the reasonable amount that should be paid as compensation
H if there is any damage to the applicant's land due to the said withdrawal application as stated under s. 35(2) of the Act.

(xiv) When the first respondent gazette the said withdrawal, there is no acquisition/possession of the applicant's land took place. Therefore, the applicant is still the valid and legal owner of the said land.

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(xv) Further, in allowing the withdrawal application by DF3, the first respondent has acted reasonably, appropriately and fairly and has taken action in accordance to the law and has not at any material times, acted in excess or without jurisdiction or in breach of art. 13 of the Federal Constitution as alleged by the applicant.

(xvi) Since there is no land acquisition that took place, therefore the applicant is not entitled for any compensation except for what has been provided under s. 35(2) of the Act since the withdrawal application by DF3 was made under s. 35 of the Act.

(xvii) The second respondent never gives any permission either in writing or orally to any party to occupy the applicant's land.

(xviii) The respondents have acted in accordance with the relevant law in allowing the withdrawal application and have not breached art. 13 of the Federal Constitution.

(xix) Since the withdrawal application was made under s. 35(1) of the Act, it is the second respondent's responsibility to take appropriate action under s. 35(2) of the Act to determine the reasonable amount to be paid to the applicant for any damage done to the applicant's land (if any) and the burden of proof is on the applicant to prove the same.

Findings Of Court

[12] The Federal Court in *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629 has set out the function of the court in an application for judicial review and the correct test to be applied in reviewing findings of fact made by the Industrial Court, to be as follows:

> [15] ... Historically, judicial review was only concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety. However, over the years, our courts have made inroad into this field of administrative law. *Rama Chandran* is the mother of all those cases. *The Federal Court in a landmark decision has held that the decision of inferior tribunal may be reviewed on the grounds of "illegality", "irrationality" and possibly "proportionality" which permits the courts to scrutinise the decision not only for process but also for substance. It allowed the courts to go into the merit of the matter. Thus, the distinction between review and appeal no longer holds.* (emphasis added)
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> [16] The *Rama Chandran* decision has been regarded or interpreted as giving the reviewing court a license to review without restrain decisions for substance even when the said decision is based on finding of facts. However, post *Rama Chandran* cases have applied some brakes to the courts' liberal approach in *Rama Chandran*. The Federal Court in the case of *Kumpulan Peransang Selangor Bhd v. Zaid Mohd Noh* [1997] 2 CLJ 11 after

affirming the *Rama Chandran* decision held that there may be cases in which for reason of public policy, national interest, public safety or national security the principle in *Rama Chandran* may be wholly inappropriate.

[17] The Federal Court, in *Petroliam Nasional Bhd v. Nik Ramli Nik Hassan* [2003] 4 CLJ 625, again held that the reviewing court may scrutinise a decision on its merits but only in the most appropriate of cases and not every case is amenable to the *Rama Chandran* approach. Further, *it was held that a reviewing judge ought not to disturb findings of the Industrial Court unless they were grounded on illegality or plain irrationality, even where the reviewing judge might not have come to the same conclusion.* (emphasis added)

[18] The Court of Appeal has in a number of cases held that where finding of facts by the Industrial Court are based on the credibility of witnesses, those findings should not be reviewed (see *William Jacks & Co (M) Sdn Bhd v. S Balasingam* [1997] 3 CLJ 235, *National Union of Plantation Workers v. Kumpulan Jerai Sdn Bhd (Rengam)* [2001] 1 CLJ 681, *Quah Swee Khoon v. Sime Darby Bhd* [2001] 1 CLJ 9, *Colgate Palmolive (M) Sdn Bhd v. Yap Kok Foong & Another* [2001] 3 CLJ 9. However, there are exceptions to this restrictive principle where:

(a) reliance upon an erroneous factual conclusion may itself offend against the principle of legality and rationality, or

(b) there is no evidence to support the conclusion reached.

(See *Swedish Motor Assemblies Sdn Bhd v. Hj. Md Ison Baba* [1998] 3 CLJ 288].

[19] It is clear from the above authorities that the scope and ambit of *Rama Chandran* had been clearly explained and clarified. Decided cases cited above have also clearly established that *where the facts do not support the conclusion arrived at by the Industrial Court, or where the findings of the Industrial Court had been arrived at by taking into consideration irrelevant matters, and had failed to consider relevant matters into consideration, such findings are always amenable to judicial review.* (emphasis added)

[13] Bearing in mind the above principles, the issue before this court is whether the withdrawal by the first respondent from the acquisition of the said land under s. 35(1) of the Land Acquisition 1960 (the Act) is illegal (*ultra vires*), irrational and/or unreasonable and an abuse of process. The applicant is challenging and seeking to quash the respondents' decision to withdraw from the said acquisition, by way of an order for *certiorari*.

[14] It is the respondents' contention that under s. 35(1) of the Act, they are at liberty to withdraw from the acquisition of the said land of which possession has not been taken place. The respondents also denied that the DF3's occupation on the said land was with their permission and put the applicant to strict proof.

Section 35(1) of the Act states: A

> (1) The State Authority shall be at liberty to withdraw from the acquisition of any land of which possession has not been taken.

Whether The Second Respondent Has Taken Possession On The Said Land?

[15] The court refers to s. 18(a) of the Act which states: B

> The Land Administrator **may take possession**:
>
> (a) of any land in respect of which an award has been made under Section 14, **such possession being taken at the time of service upon the occupier of such land of a notice in Form H, or at any time thereafter**. (emphasis added) C

Section 18(a) does not specifically prescribe the manner by which physical possession is to be effected. In *Dato' Fong Chow & Ors v. Pentadbir Tanah Daerah Jerantut & Anor* [1988] 1 LNS 94; [1988] 3 MLJ 325, 327, Lamin J (as he then was) held that: D

> The Act provides for various incidents of taking possession such as formal possession, possession in urgent cases and possession at the time of service upon the occupier of the land of a notice in Form H. **Most importantly, it must be remembered that the Collector has the power under s. 18(a) to take possession 'at any time' after the service of Form H.** This strongly suggests that no other ideas of 'possession' can be read into the Act and if the Act intends otherwise, the legislature would have said so in some form. (emphasis added) E

[16] Further, in *Hong Lee Trading & Construction Sdn Bhd v. Taut Ying Realty Sdn Bhd* [1991] 1 CLJ 121; [1991] 2 CLJ (Rep) 722; [1991] 1 MLJ 250, Lamin J (as he then was) at p. 725 (CLJ); p. 252 (MLJ) held: F

> So the Collector may take possession upon service of Form H. ie, the offer of the award, or at any time thereafter or on a certificate of urgency under s. 19. Under our law formal possession may also be effected under s. 22. Quite clearly I think ss. 18 and 19 do envisage physical taking of possession. However, the Act does not lay down the manner by which physical possession is to be effected and it is the same as in India. Aggrawala states at p. 328: G
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> > The manner of taking possession is not prescribed but it is presumed the Collector would enter into occupation, or do something to indicate the fact. H

[17] Based on the authorities above, the facts showed that a notice of the award in Form H dated 9 October 2017 pursuant to s. 16 of the Act was served on the applicant on the same day. By plain reading of s. 18(a) of the Act, the second respondent had taken possession of the said land upon service of Form H. I

[18] Further, the second respondent has admitted to issuing the Form H to the applicant. By letter dated 9 October 2017, the second respondent had also forwarded the Form H to KKR requesting for the compensation sum to be paid (exh. "NH6", respondents' affidavit in reply). Subsequently, in an affidavit affirmed by an officer of DF3 on 10 October 2018 in Suit 436, DF3 admitted to entering the said land with the permission of the relevant authority and Datuk Bandar Kuala Lumpur. The excerpt of the admissions are reproduced below (exh. "FF10", para. 10 of DF3's affidavit):

> 10. Perenggan 17 Afidavit Sokongan Pemohon dinafikan kecuali dan melainkan *bahawa kerja-kerja pembinaan untuk projek Lebuhraya Setiawangsa – Pantai Expressway (SPE) adalah dijalankan oleh Responden Kedua.* Pemohon diletakkan atas beban bukti yang kukuh untuk membuktikan dakwaan-dakwaannya. Saya ingin menyatakan bahawa:
>
> (a) Saya mengulangi perenggan-perenggan di bawah afidavit ini dan ingin menyatakan bahawa *kemasukan Responden Kedua ke hartanah-hartanah untuk projek SPE adalah berdasarkan kebenaran daripada pihak berkuasa yang berkaitan dan juga DBKL.*
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> (b) Saya sesungguhnya percaya bahawa *kerja-kerja pembinaan yang dijalankan oleh Responden Kedua adalah di atas dan/atau sebelah ambang/sempadan dan jalan-jalan kepunyaan DBKL.*

[19] It is undisputed fact that possession of the land has been taken by DF3 and DBKL, by permission of the second respondent, and work has commenced and is continuing and this can be seen from the colour photographs of the works being carried out on the land as at 14 February 2019 annexed as exh. "FF15", applicant's affidavit in support. Further, evidence of DF3's occupation on the land is obvious as the safety cones been labelled as "DUKE EKOVEST". The court is of the view that the photographs as exhibited are incontrovertible evidence of this fact.

[20] The court agrees with the applicant's submission that DF3's letter to LLM dated 10 November 2017 confirming that there will be no change in the design of the highway clearly shows DF3's intention to remain on the land and continue with the construction and completion of the highway despite the alleged withdrawal of the acquisition. If DF3 was not allowed into possession of the said land by the second respondent, there is absolutely no need for DF3 to give such an indemnity to the second respondent.

[21] It is evident that the respondents had taken possession of the said land under s. 18(a) of the Act and it cannot be withdrawn as it contravened s. 35(1) of the Act. In such circumstances, the respondents' averment that possession has not been taken and not allowed any party to enter the said land are not true.

[22] The respondents are relying on *Ishmael Lim Abdullah v. Pesuruhjaya Tanah Persekutuan & Anor* [2014] 7 CLJ 882; [2015] 2 MLJ 126, CA which held:

> [46] Essentially, what s. 35 of the Act means is that once possession of the land has been taken, the acquisition process is complete and it will be too late for the state authority to withdraw from the acquisition. The acquisition process is deemed ended and final and the state authority cannot resile from its position.

[23] As rightly submitted by the applicant's counsel that in *Ishmael Lim*'s case (*supra*), although the Form K was issued, physical possession of the land had not been taken until March 2005 as it was only in March 2005 that Ishmael was served with a notice to vacate and demolish any structures on the land on or before 22 March 2005. It is to be noted that the Court of Appeal in explaining s. 35 did not say that possession is taken when Form K is issued. It clearly said that once possession of the land has been taken, the acquisition process is complete and cannot be withdrawn.

[24] The respondents further rely on "Pekeliling Ketua Pengarah Tanah dan Galian Persekutuan Bilangan 27/2009" ("the circular") to suggest that the circular indirectly states that if there is no formal possession under s. 22 of the Act, a withdrawal from the acquisition is still permitted under s. 35(1) of the Act. The circular relied upon by the respondents does not address the circumstances mentioned in the circular where possession can be taken under the Act. Formal possession is only required when the land has a building erected on it. Otherwise, possession can be taken at the time Form H was issued which is clearly the case before this court. The plain reading of s. 35(1) shows that nowhere in s. 35(1) does it state that possession means a "formal possession". The word "possession" in s. 35(1) encompasses possession as specified in s. 18 of the Act. The circular relied on is misconceived and is contrary to the provisions of the Act.

[25] The respondents' submission that the State Authority may withdraw from the acquisition, as long as Form K has not been issued is unsupported in law and devoid of merits. It is abundantly clear that the respondents had taken possession of the said land and allowed a highway to be built on it.

Whether The Withdrawal Of Acquisition Was Reasonable And Fair

[26] The respondents submit that DF3's request to withdraw from the acquisition was made before acquisition was completed. Thereafter, a meeting was held on 21 November 2018 where DF3's request was approved. Subsequently, the withdrawal was gazetted on 14 January 2019. In that circumstances, the respondents claimed that they have acted reasonably and fairly in withdrawing from the acquisition as formal possession has not been taken.

[27] It is an undisputed fact that possession has been taken since 9 October 2017 and a highway has been constructed on it. The minutes of the meeting on 14 January 2019 is not before this court. Possession cannot be denied. There are no good grounds put forth as to why the request for the withdrawal was approved and consequently gazetted when in fact there is a highway constructed on the said land which cannot be removed. The highway is surely in furtherance of a public purpose. The applicant has been dispossessed of the said land.

[28] Further, the applicant's land has been taken and yet the second respondent refuses and/or failed to pay the compensation awarded. The second respondent having taken possession of the land and allowing DF3 to construct a highway on it and now allows DF3's request to withdraw from the acquisition is beyond imagination that can be said that the respondents have acted reasonably, fairly and rationally. In fact, the respondents' purported act of withdrawing is contrary to s. 35(1) of the Act and it is *ultra vires.*

[29] This court is guided by the Supreme Court's decision in *Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers* [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159; [1991] 1 MLJ 417 about unreasonableness and the Supreme Court adopted the meaning of unreasonableness from the case of *Associated Provincial Picture Houses v. Wednesbury Corp* [1948] 1 KB 223, at p. 423 held:

> It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere.

[30] The importance of an administrative authority acting within four corners of its discretion was summarised in *Associated Provincial Picture Houses v. Wednesbury Corp* [1948] 1 KB 223 at p. 228, Lord Greene in his judgment said:

> What, then, is the power of the courts? They can only interfere with an act of executive authority if it be shown that the authority has contravened the law. It is for those who assert that the local authority has contravened the law to establish that proposition. On the face of it, a condition of the kind imposed in this case is perfectly lawful. It is not to be assumed *prima facie* that responsible bodies like the local authority in this case will exceed their powers; but for court, whenever it is alleged that the local authority have contravened the law, must not substitute itself for that authority. It is only concerned with seeing whether or not the proposition is made good. When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts

> in a strictly limited class of case. As I have said, it must always be remembered that the court is not a court of appeal. When discretion of this kind is granted the law recognises certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in court of law. *What then are those principles? They are well understood. They are principles which the court looks to in considering any question of discretion of this kind. The exercise of such discretion must be a real exercise of discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard those matters.*
>
> (emphasis added)

[31] In accordance with the SPE Project, the land previously zoned for residential use under the Draft Kuala Lumpur 2020 City Plan has been changed to transportation. Being zoned for transportation use, the estate of the deceased have limited use or no use at all for the land. Permanent modifications have been made to the said land and permanent structures such as concrete pillars supporting an elevated highway and a bottom road highway have been erected and constructed on the land. All in all, the withdrawal is unreasonable and an abuse of process as the usage of said land has been changed from residential to transportation and two highways are running through the land currently, the withdrawal at this juncture is illogical and irrational.

[32] Despite the intention to continue occupying the land, the second respondent nonetheless refused to pay the compensation sum and purports to withdraw from the acquisition. The second respondent had acted irrationally and so unreasonable by commencing land acquisition proceedings, making the award, taking possession of the land and then refusing to pay compensation sum which this court is of the view that the respondents are liable for breaching art. 13 of the Federal Constitution and the Act.

> Article 13 – Rights to property
>
> (1) No person shall be deprived of property save in accordance with law.
>
> (2) No law shall provide for compulsory acquisition or use of property without adequate compensation.

[33] In *Malaysia Airlines System Bhd v. Wan Sa'adi Wan Mustafa* [2015] 1 CLJ 295; [2015] 1 MLJ 757, FC at p. 305 (CLJ); p. 768, paras. 24 and 25 (MLJ) explains circumstances that involved procedural impropriety when a decision-maker empowered by public law in the form of legislation, in coming to a decision with consequence affecting a person. The Federal Court held:

A [24] Now, procedural impropriety is said to have occurred when a decision maker (including an administrative tribunal or an arbiter) empowered by public law in the form of legislation or common law (that is, prerogative power), in coming to a decision (including his refusal to make a decision) with consequences affecting 'some person or (body of persons)', fails:

B (a) to observe the 'basic rule of natural justice';

(b) 'to act with procedural fairness towards the person who will be affected by the decision'; or

(c) 'to observe procedural rules that are expressly laid down in Legislative instrument by which its jurisdiction is conferred, even C where such failure does not involve any denial of natural justice' (see *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374).

[25] The basic rules of natural justice are generally understood to mean the right to be heard, the rule against bias and the duty to act fairly. D However the scope of the 'duty to act fairly' should be considered on a case to case basis depending on the facts and circumstances governing the relationship of those involved prior to the decision being made.

[34] Applying the principles in the above cases with the facts of this case, this court finds that the respondents failed to observe the basic rules of E natural justice, to act with procedural fairness toward the applicant who will be affected by the decision and to observe procedural rules that are expressly laid down in statute, even when such failure does not deny natural justice.

Conclusion

[35] In conclusion, the respondents' stance that the Form K is the only F means to take possession is misconceived. A reading of the Act will show that Parliament had only intended for Form K to be utilised to take possession of land that contains a building(s), otherwise, possession can be taken upon service of the Form H or I. Possession does not mean only formal possession. Section 35 of the Act is clear on this. Therefore, once possession G has been taken in any of the three instances as specified in the Act, withdrawal from acquisition is prohibited. The State Authority misunderstood the meaning and effect of s. 18 and s. 35 of the Act in coming to its decision to withdraw from the acquisition, whereby rendering its decision illegal.

H **[36]** There can be no doubt that possession of the said land has been taken. Therefore, the respondents cannot now withdraw from the acquisition pursuant to s. 35(1) of the Act. The withdrawal is *ultra vires* the Act, illegal, irrational, unreasonable and an abuse of process. The withdrawal must be quashed.

I **[37]** Accordingly, the court allowed the applicant's application for judicial review with costs of RM5,000 subject to allocatur.